Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning	)	
the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

PETITION FOR CLARIFICATION AND RECONSIDERATION OF THE STATE OF HAWAII

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September 16, 1996

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The State of Hawaii (the "State"),[1] by its attorneys, hereby petitions the Commission to clarify and reconsider portions of its August 7, 1996 Report and Order in the above-captioned matter.[2]

I. Introduction and Summary

The Commission is to be applauded for doing much to effectuate the thrust of Section 254(g). By applying geographic rate averaging and rate integration requirements to all carriers regardless of their size and regardless of regional variations in competition, the Commission has appropriately interpreted the significance of this section; i.e., as necessary to ensure that all Americans receive telecommunications services at reasonable rates and enjoy the benefits of increased competition among telecommunications carriers. Given all

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1 This petition is submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

2 See Policy and Rules Concerning the Interstate, Interexchange Marketplace/ Implementation of Section 254(g) of the Communications Act of 1934, as amended, Report and Order, CC Docket No. 96-61, FCC 96-331 (released Aug. 7, 1996).

that the Telecommunications Act of 1996 requires the Commission to do, its efforts in this proceeding are commendable. The State's request for further refinement of the Commission's decision should in no way detract from this conclusion.

The Commission's Order nonetheless needs to be clarified and reconsidered in three respects in order to assure that the statutory mandate is properly applied, and that carriers do not misread the Order as an invitation to avoid the statutory principles of geographic averaging and rate integration:

- First, the Commission has correctly concluded that no carrier has justified forbearance from the statute's rate integration requirement. The Commission should also assure, however, that rate integration is not undermined by its decision to forbear, in certain circumstances, from requiring geographic rate averaging. Specifically, the Commission should clarify that carriers must comply with the rate integration requirement even where the Commission has forborne from the geographic rate averaging requirement; that is, any forborne, non-averaged methodology used to calculate the rates for a particular service must be employed consistently across all states in which the carrier provides that service.

- Second, the Commission should clarify its articulation of the legal rationale for forbearing from the geographic averaging requirement. Using AT&T's tariffing practices as the starting point for the Commission's forbearance analysis is both inconsistent with Congress's intent that any forbearance be "limited," and will disserve the public interest by creating uncertainty as to what past practices can properly serve as examples of compliant pricing practices.

- In addition, the Commission can and should tailor its forbearance actions more narrowly and, thereby more closely track congressional intent. In particular, the Commission should clarify that it need not have granted forbearance with respect to optional calling plans, contract tariffs and Tariff 12 offerings that involve discounts off of geographically averaged basic rate schedules, when those offerings are made available on a nondiscriminatory basis throughout a carrier's service area.

Without clarification and reconsideration along these lines, the Commission risks undermining Section 254(g) before subscribers begin to enjoy its benefits, as well as being

burdened later with numerous questions regarding enforcement and interpretation of the Order.

II. Congress's Rate Integration Policy Requires That the Methods for Calculating a Service's Rates Be the Same Throughout the Carrier's Service Area; Non-Averaged Rates Should Not Run Afoul of This Requirement

In enacting Section 254(g), Congress codified geographic rate averaging and rate integration as national ratemaking policies essential to the promotion of universal service. Each policy assures that the benefits of advanced telecommunications and the benefits of a liberalized regulatory environment will be made available to all Americans. In this regard, as the State has argued throughout this proceeding, Congress has expanded the policies' purpose and scope beyond the Commission's previous applications of them.

Given the breadth of this mandate, the Commission has concluded that no carrier has justified forbearance from the rate integration requirement.[3] The State agrees. Indeed, as the State also indicated previously, although the Commission traditionally has pursued rate integration in its efforts to incorporate remote points into the fabric of the national telecommunications market, rate integration has never been an discretionary Commission policy. It is a national, statutory policy borne out of Section 202(a) of the Act. That provision prohibits any unreasonable discrimination based on a customer's location.

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[3] See Order at ¶¶ 52-54. Rate integration requires a carrier to use the same ratemaking methodology for the same service throughout its service area. See MTS and WATS Market Structure, 81 F.C.C.2d 177, 192 (1980). For example, if a New York customer is offered postalized rates for switched traffic in the continental U.S., rate integration requires that postalized rates for this service must apply to traffic to and from offshore points as well. However, rate integration alone would not require the customer to be offered any specific rate structure.

Rate integration is a necessary corollary of Section 202(a) because it ensures against location-specific discrimination in the methodology of calculating rates.[4] The Commission has expressly noted that "a rate structure that uses different ratemaking methods to determine the rates that different users pay for comparable services is inconsistent with the national policy prohibiting unjust or unreasonable rate discrimination, as expressed in Section 202(a)."[5] The general prohibition against unreasonable discrimination which underlies rate integration has now been repeated in Section 10(a)(1) of the Act.[6] Thus, to be consistent with Sections 10, 202(a) and 254(g) of the Act, forbearance from rate integration is untenable.

Although the Commission has refused to forbear from the rate integration requirement, its decision to forbear from aspects of the geographic averaging requirement has the potential to create uncertainty as to what pricing practices are permissible and impermissible. Clarification of the Order is necessary to assure that forbearance from the geographic averaging requirement does not result in de facto forbearance from the statutory rate integration principle. The Commission should assure that there is no tampering with the rate integration principle -- either intentionally or unintentionally, either on reconsideration in this proceeding or in future compliance proceedings.

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[4] See 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference . . . to any . . . locality, or to subject any . . . locality to any undue or unreasonable prejudice or disadvantage").

[5] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Notice of Proposed Rulemaking, 1985 FCC LEXIS 2532 at ¶ 10. See also MTS and WATS Market Structure, 81 F.C.C.2d at 192.

[6] See 47 U.S.C. § 10(a)(1) (to justify forbearance the Commission must ensure that the forborne carriers' classifications shall remain "just and reasonable and . . . not unjustly or unreasonably discriminatory").

Specifically, the Commission should clarify that rate integration requires a carrier to use the same ratemaking methodologies for the same services throughout its service area even if the Commission has forborne from requiring those rates to be geographically averaged. Since there was no forbearance with respect to rate integration, it should be made clear that if a carrier's promotional discount, custom tariff, Tariff 12 offering, optional calling plan or private line service employs one structure for Mainland traffic, then the carrier must employ the same rate structure for offshore points. This rule would apply regardless of the geographic location of the customer for the service.

The Commission's discussion of contract tariffs demonstrates the need to keep clear the distinction between rate averaging and rate integration. The Commission notes that contract tariffs "generally" involve discounts off of basic rate plans.[7] As discussed more fully below, such discounts should not create a forbearance issue because they would be derived from already-averaged rates. However, even where the Commission might allow a contract tariff to contain non-averaged rates, rate integration would require the carrier to use the same rate structure within that tariff for the provision of services to and from offshore points as it would use in calculating charges for services within the continental U.S. Forbearance to allow a non-averaged contract should not be read as an invitation to offer a contract with, for example, postalized rates for the continental U.S., but distance-sensitive rates for offshore points. Such geographic discrimination within a contract tariff would unjustly discriminate against offshore points and, essentially, effectuate an end run around the statutory prohibitions against such discrimination.

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[7] See Order at ¶ 20.

Given the potential for confusion over this point, the Commission should clarify that carriers' practices with regard to any service cannot create rate structures which ultimately exclude customers from those structures based solely on their geographic locations -- in other words, in violation of the rate integration requirement.

III. The Commission Should Reconsider the Legal Basis of its Forbearance Decisions With Regard to Geographic Averaging

A. Congress sanctioned only limited exceptions to the geographic rate averaging requirement

The Order suggests in various places that Congress intended "to codify" or "to continue" the Commission's pre-existing rate averaging and rate integration policies.[8] Based on this interpretation, the Commission concludes that it can rely, at least to some degree, on its past treatment of AT&T's tariff offerings to determine the extent to which Congress has intended the Commission to forbear from the geographic averaging requirement. In the Order, the Commission then proceeds to forbear from the enforcing the geographic averaging requirement "to the extent necessary" to allow carriers to continue to offer contract tariffs, Tariff 12 offerings, optional calling plans, promotional discounts, and private line services, subject to certain conditions derived from the Commission's oversight of AT&T's tariffs.[9]

The State respectfully submits that the Commission's forbearance analysis starts off on the wrong foot, and as a result is inconsistent with congressional intent. By using AT&T's tariffs as the starting point of its forbearance analysis, the Commission

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[8] Id. at ¶¶ 3 & 9.

[9] See id. at ¶¶ 20-30.

violates the principle that congressional intent must first be determined from the language of the statute. As the State has mentioned, Section 254(g) admits of no exceptions. Thus, to be true to the statute, the Commission should be extremely reluctant to use its forbearance authority so shortly after Congress has spoken. Where the Commission does forbear, it should: (1) expressly state the scope and terms of its forbearance action; (2) clarify that it is doing so based on the statute itself (as elaborated upon by the legislative history); and (3) make clear that it has conducted a de novo assessment of whether forbearance meets the Section 10 criteria. In short, carriers should not be led to believe that AT&T's tariffs define the scope of the Commission's forbearance decisions.

Neither the statute nor its history sanctions the Commission's approach. The Commission claims that according to "[t]he legislative history of Section 254(g) . . . Congress intended to 'incorporate' our existing policy concerning geographic rate averaging . . . ."[10] When read in context, the single word "incorporate" cannot support the Commission's proposition. It is of course undeniable that Congress "incorporated" the geographic averaging concept into the statute, but this action cannot be read to suggest that Congress meant for the Commission to apply the geographic averaging principle only as the Commission had in the past.

Rather, if anything, the history recognizes that geographic averaging is a stand-alone ratemaking policy. Without qualification, the legislative history states that "section 254(g) is intended to incorporate the polic[y] of geographic rate averaging . . . in order to ensure that subscribers . . . throughout the Nation are able to continue to receive . .

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[10] Order at ¶ 21 (emphasis added).

. services at rates no higher than those paid by urban subscribers."[11] The history then instructs the Commission, again without qualification, "to require geographic rate averaging."[12] Congress expressly rejected efforts to narrow the scope of the geographic averaging principle to cover only residential services, as AT&T apparently persuaded the Commission to do within the several months before passage of the Telecommunications Act.[13] The Commission's reliance on AT&T's tariffs thus disregards the clear evidence that Congress has adopted rate averaging as its own policy for promoting universals service goals, as well as Congress's straightforward admonishment that any exception to its policy should be "limited."[14] Indeed, had Congress intended simply to keep in place the status quo -- i.e., codifying the Commission's application of the rate averaging principle -- it could have easily done so without the broad language of the statute or the carefully crafted language of the legislative history.

The Commission should reconsider its Order to make clear to carriers that AT&T's tariffs are not the repository of examples of permissible deviations from the geographic averaging requirement.

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[11] S. Rep. No. 230, 104th Cong., 2d Sess. 132 (1996) ("Conference Report").

[12] Id.

[13] See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, at Appendix II (1995), recon. pending, (accepting AT&T's commitment to provide five days' notice of any effort to deaverage residential direct dial rates).

[14] See Conference Report at 132.

B. Relying on AT&T's tariffs as the basis for the Commission's forbearance analysis will disserve the public interest

By using AT&T's tariffs as a starting point, the Commission also jeopardizes regulatory certainty. Such an approach is an open invitation for avoidance of the conditions that the Commission has imposed on its forbearance decisions. From an enforcement standpoint, the Commission risks generating the perception that "anything AT&T did, all carriers can now do." To avoid this possibility, the Commission should make it clear that every prior AT&T departure from rate averaging does not provide a basis for forbearance today.

Undoubtedly, the Commission has not assessed the impact of every past AT&T practice on geographic averaging. The Commission has long held that permitting a tariff to go into effect is not a determination of the tariff's lawfulness. AT&T has filed thousands of pages of tariffs under this rule, and the vast majority have gone into effect without Commission determinations as to their lawfulness. It would be singularly inappropriate to use AT&T's tariffs as the basis of forbearance interpretations when the Commission has permitted AT&T tariffs to go into effect without determining in a written record whether or not they comport with either previously existing or new statutory averaging requirements. Certainly, the record of this proceeding does not contain a systematic review of these tariffs, and the State does not believe that this was the proceeding's intent.[15]

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[15] In the past, the State has protested efforts by AT&T to undermine the geographic averaging and rate integration principles, but of course the State cannot, nor does it believe the Commission can, guarantee that all of AT&T's tariffs have been thoroughly reviewed. See, e.g., AT&T Communications Revisions to Tariff F.C.C.

IV. The Commission Need Not Have Granted Forbearance With Respect to Optional Calling Plans, Contract Tariffs and Tariff 12 Offerings That Involve Discounts Off of Geographically Averaged Basic Rate Plans and That Are Made Available Throughout a Carrier's Service Area

The Commission has forborne from Section 254(g)'s rate averaging requirement "to the extent necessary" to allow carriers to make available optional calling plans, contract tariffs and Tariff 12 offerings. Carriers, however, must (and the State wholeheartedly agrees that they must) make these services available to similarly situated customers regardless of their geographic location.[16] That said, forbearance "to the extent necessary" does not give sufficiently clear guidance to either carriers or subscribers as to what deviations from geographic averaging are permissible. Forbearance "to the extent necessary" invites carriers to develop their own interpretation of the amount of flexibility they have. As noted in the preceding section, such ambiguity in the Commission's decision only invites further interpretation disputes and enforcement problems down the road.

To avoid these problems -- especially given the Commission's primary decision to continue to prohibit most geographically discriminating offerings -- the Commission can and should more narrowly define its forbearance decisions. For one, the Commission defines optional calling plans as involving discounts from basic rate schedules.[17] If basic rate schedules are averaged (as required by Section 254(g)), and if

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No. 12; Transmittal Nos. 1948, 2033 and 2102, 5 FCC Rcd 1283 (Com.Car.Bur. 1990) (in which, after the State's protest, AT&T eliminated surcharges from its otherwise postalized rate schedule that applied only to Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands).

[16] See Order at ¶ 27.

[17] See id. at ¶ 20.

optional plans offer geographically non-discriminatory discounts off those schedules, optional plans also will be averaged. Thus, there is no need for forbearance in this instance.[18]

The Commission likewise defines contract tariffs and Tariff 12 offerings as "generally" involving discounts from basic rate schedules.[19] Where the basic schedule is averaged, these services also will remain averaged and, again, forbearance is unnecessary.

Using this framework, the Commission need only address whether to depart from geographic averaging for private line rates, promotional discounts and the occasional non-averaged contract tariff. Such an approach would allow the Commission to consider granting "limited" forbearance, consistent with the plain meaning of the statute and its legislative history. Such an approach also would promote effective implementation and enforcement of the Commission's forbearance decisions by allowing the Commission to identify more precisely the nature of permitted departures from the statutory requirements.

In all events, as indicated above, the Commission should assure that any pared back forbearance decision with regard to rate averaging should not undermine the rate integration requirement.

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[18] Paragraph 25 of the Order contains language which could be read as undermining carriers' requirement to offer optional call plans on a geographically nondiscriminatory basis. This language should be clarified to eliminate any impression it might create that optional plans need not be made available to all similarly situated customers.

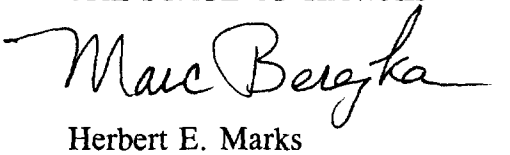
[19] See Order at ¶ 20.

V. Conclusion

For the foregoing reasons, the State of Hawaii urges the Commission to reconsider and clarify its actions in this proceeding in order to fully effectuate Congress's universal service goals, as enunciated in new Section 254(g) of the Communications Act.

Respectfully submitted,

THE STATE OF HAWAII



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